

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

KAMINSKI ELECTRIC &
SERVICE CO., INC.

Cases 25-CA-23807-1 & 2
25-CA-24059-1,2&3

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL 1701
a/w INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO

Raifael Williams, Esq., for the General Counsel.
William G. Craig, Jr., Owensboro, Kentucky, for Respondent.

SUPPLEMENTAL DECISION

ARTHUR J. AMCHAN, Administrative Law Judge. On September 29, 2000, the Board issued a decision in this case affirming, with certain exceptions, the rulings, findings and conclusions of Judge Robert T. Wallace in his October 31, 1997 decision, 331 NLRB No. 42. However, the Board remanded the issue of whether Respondent violated Section 8(a)(3) and (1) by refusing to hire union-affiliated applicants Gerald Frey and Gerald Snodgrass, for further consideration in light of the Board's recent decision in *FES (A Division of Thermo Power)*, 331 NLRB No. 20 (2000).

Due to Judge Wallace's retirement, the Board's Chief Administrative Law Judge reassigned this case to me. On January 29, 2001, I issued a notice and invitation to file briefs on how the *FES* framework applied to the record in this case. The General Counsel filed a brief in response; Respondent's Counsel submitted a Notice of Dissolution regarding Respondent. After reviewing the record and these submissions, I conclude that the General Counsel has established that Respondent violated the Act in refusing to hire Frey and Snodgrass.

Summary of the Facts

Respondent is a nonunionized electrical contractor in Owensboro, Kentucky. It generally employed about 5 electricians. Sometime early in 1995, prior to late March, Chester Kaminski, Respondent's president, bid on the electrical work at the Premium Allied Tool (PAT) jobsite. This was a relatively large project requiring more electricians than Kaminski normally employed. In January 1995, Respondent ran newspaper advertisements for electricians. Gary Osborne, an organizer for IBEW Local 1701 contacted Kaminski and offered to provide electricians; Kaminski declined the offer. Respondent hired one electrician in January.

On February 8, 1995, Osborne sent Kaminski the employment applications of three journeymen electricians. On February 10, he sent two more applications. On February 13, Chester Kaminski responded to Osborne by letter, informing him that it had no interest in employing individuals who were already employed at a much higher wage rate.

This letter continued:

I will retain these applications on file and your transmittal letters and will contact these individuals if I find that our circumstances have changed at some point in the future...

Hereafter, if you truly believe an individual might desire employment with our company, please have the individual come to our office and make application, personally, completing the usual procedures we use in the employment process...

On February 16, 1995, two licensed journeyman electricians, Gerald Frey and Gerald Snodgrass, stopped by the union hall. Both were members of Local 1701, who were engaged in a strike against another nonunion electrical contractor. Organizer Osborne asked them to go to Kaminski's offices the next day and apply for work.

Frey and Snodgrass went to Kaminski's office on February 17, wearing union paraphernalia. They told Chester Kaminski that they were licensed electricians and that they would like to fill out employment applications. Kaminski told Frey and Snodgrass that Respondent was not taking applications and then indicated that Frey and Snodgrass should leave the office.

That afternoon, Chester Kaminski went to the Kentucky Cabinet for Work Force Development to request that the agency receive applications for his company and refer applicants to him. Kaminski interviewed applicants referred by the Kentucky Cabinet on February 22. On March 21, Frey applied at the Kentucky Cabinet for employment as an electrician or helper. His application was forwarded to Respondent, which never contacted Frey. In March, Respondent was awarded the contract on the PAT project. Between March 27, and late July, it hired three licensed electricians and as many as twenty helpers.

Prior decisions by Judge Wallace and the Board

Judge Wallace found that Respondent had refused to consider Frey and Snodgrass for hire, in violation of Section 8(a)(3) and (1). No exceptions were filed to this ruling. However, Judge Wallace dismissed the allegation that Kaminski refused to hire Frey and Snodgrass because Respondent did not hire anyone between January and mid-March 1995. He deferred to compliance the issue of whether Kaminski would have hired them for subsequent openings, absent the discriminatory refusal to consider.

The Board did not adopt Judge Wallace's dismissal of the refusal-to-hire allegation. It found that the General Counsel had established the necessary elements of a refusal to hire violation under the standards set forth in *FES*. These elements are as follows:

that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants.

The Board stated further in *FES* that, in a discriminatory hiring case, the General Counsel must show that there was at least one available opening for the applicants. It also held that the General Counsel must show at the hearing on the merits the number of openings that were available. However, where the number of applicants exceeds the number of available jobs, the compliance proceeding may be used to determine which of the applicants would have been hired for the openings.

Once the elements of a refusal-to-hire violation are established, the burden shifts to the employer to show that it would not have hired the applicants even in the absence of their union activity or affiliation. In *FES*, the Board held that the issue of whether the alleged discriminatees would have been hired but for the discrimination against them must be litigated at the hearing on the merits. The Board remanded this case because Judge Wallace had made no findings as to whether Respondent met its burden in establishing its affirmative defense. After reviewing the record and the parties' submissions, I conclude that Respondent has not met its burden and that therefore it violated Section 8(a)(3) and (1) in refusing to hire Gerald Frey and Gerald Snodgrass.

Respondent has not raised any defenses or rationale for its actions that were not rejected with regard to the refusal to consider allegations. Kaminski filled positions between March 27, and late July 1995, that could have been filled by Frey and Snodgrass. Finally, as Respondent's February 8, 1995 letter shows, had Frey and Snodgrass' applications been accepted on February 17, they would have been on file when Kaminski hired employees for the PAT project from late March through July.

Conclusions of Law

By refusing to hire Gerald Frey and Gerald Snodgrass, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having refused to hire Gerald Frey and Gerald Snodgrass, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the date they would have been hired less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Kaminski Electric & Service Company, Owensboro, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to hire applicants on the basis of their union affiliation or based on Respondent's belief or suspicion that they may engage in organizing activity once they are hired.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Gerald Frey and Gerald Snodgrass instatement to a job for which they applied or a substantially equivalent position, without prejudice to their seniority or any other rights or privileges.

(b) Make Gerald Frey and Gerald Snodgrass whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its Owensboro, Kentucky facility, copies of the attached notice marked "Appendix."² Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 17, 1995.

² If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

5 Dated, Washington, D.C. March 19, 2001.

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ARTHUR J. AMCHAN
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to hire job applicants on the basis of their union affiliation or based on our belief or suspicion that they may engage in organizing activity once they are hired.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make whole, with interest, Gerald Frey and Gerald Snodgrass for any economic loss suffered as a result of our failure and refusal to hire them.

WE WILL offer Gerald Frey and Gerald Snodgrass employment in positions for which they applied. If those positions no longer exist, we will offer them employment in substantially equivalent positions, without prejudice to seniority or any other rights or privileges to which they would have been entitled if we had not discriminated against them.

KAMINSKI ELECTRIC & SERVICE CO., INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 575 North Pennsylvania St., Room 238, Indianapolis, Indiana 46204-1577, Telephone 317-226-7413.